The Commission cannot now distort 65-year old language drafted under entirely different circumstances to claim authority to act in ways that Congress never even conceived might be necessary. *See, e.g., Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 120 S.Ct. 1858, 1868 n.12 (2000) (1986 amendment of 1863 statute did not alter original meaning of unamended provision); *American Casualty Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n. 7 ((2d Cir. 1994) (holding the same); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1057 (D.C. Cir. 1981); *Kirchner v. Kansas Turnpike Authority*, 336 F.2d 222, 230 (10th Cir. 1964).

In its effort to stretch the language of the Act, the FNPRM relies on Title II's framework for Commission regulation of the practices of carriers. The trouble with this approach is simply that the traditional tariffing procedures the FNPRM refers to, principally Sections 201(b), 202(a), and 205(a), apply to the provision of interstate communications services. *See* FNPRM at ¶ 134. But obtaining access to a building is not the provision of communications service — Congress never even dreamed that the Commission would try to apply those sections to such an issue, and by their own terms they do not apply. Similarly, Section 411 does not apply, nor do the cases cited in the FNPRM. We will address these in turn.

Section 201(b) and the International Settlements Decision. The FNPRM seems to assert that Section 201(b) permits the Commission to regulate any contract made by a carrier. FNPRM at ¶ 135. This cannot be true. What the statute requires is that "all charges, practices, classifications and regulations for and connection with such communications service" be "just and reasonable." As discussed above, this section was never intended to apply to building access agreements; Congress was first and foremost concerned with relations between carriers and their subscribers. Section 201(b) does not grant plenary authority over all carrier contracts, and the further removed a contract is from the subscriber-carrier relationship, the less and less likely it is to be a "practice" "for and in connection with a communications service." A building access agreement, is not such a "practice" because an access agreement is an agreement for the use of real property, and any connection between the terms of access to a building and the terms of service to subscribers is tenuous and remote.

In addition, it is clear from the context that the practices referred to in Section 201(b) are those established by a carrier in its tariffs or service agreements, because the same litany, "charges, practices, classifications, and regulations," sometimes with additional elements included, is repeated in Sections 202, 203, 204 and 205.

The Commission's reasoning must be flawed, simply because it goes too far. If the Commission can regulate any contract made by a carrier under the theory that it is a "practice" "in connection ... communications service," can the Commission regulate the salaries of carrier executives? What about the terms of health insurance policies, working conditions, the prices of equipment, office rents, and everything else that might be a "practice"? The Commission's reading of Section 201(b) simply proves too much.

The FNPRM places great store in *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999), claiming that it demonstrates that Section 201(b) authorizes the Commission to indirectly regulate entities outside its jurisdiction.[89] It is true that there is broad dicta in *Cable & Wireless* about the Commission's authority over "the prices U.S. carriers pay to non-FCC-regulated

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[89] The FNPRM cites two other cases for the same proposition. FNPRM at ¶ 139, *citing Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). In both cases, the Commission regulated companies affiliated with broadcasters to control the activities of the broadcasters. In this rulemaking, of course, no such affiliate relationship exists, nor is the FCC acting under its authority over broadcasting.

entities for goods and services." 166 F.3d at 1231. The two cases are so distinguishable, however, that this language cannot be said to support the Commission's ability to impose indirect obligations on building owners.

First of all, as noted above, Section 201(b) applies to the practices of carriers in connection with communications service. There is no relationship between the right to occupy private property and the terms on which a carrier provides service. The Commission may be entitled to resolve statutory ambiguity, but it is not entitled to wrench statutory language out of its historical context in order to expand its jurisdiction. In *Cable & Wireless*, the FCC was regulating a "practice" within the meaning of Section 201(b): the price U.S. carriers pay foreign carriers for terminating calls. This is a far cry from the alleged practice in this case, because the terms of building access agreements have nothing to do with the actual provision of any service.

Second, there are no parallels between the various parties in the two situations. In *Cable & Wireless*, only two entities — the two carriers — were involved. In the building access case, the Commission wishes, in effect, to regulate the ILEC to force building owners to confer a benefit on the CLEC. The presence of a third entity, who is not engaged in the communications business at all, makes this case entirely different from *Cable & Wireless*.

Third, in *Cable & Wireless*, the court stated that the Commission's position was reasonable "[b]ecause domestic carriers operate in a competitive market [and] … face a serious dilemma when they bargain with monopolist foreign carriers." 116 F.3d at 1229. In the building access situation, however, it is the ILECs that have market power, not building access. It is extremely risky, if not impossible, for a building owner to deny access to the ILEC, and so the ILEC often gets favorable terms. Competitors, on the other hand, are subject to market forces and must negotiate with building owners on a level playing field. The FNPRM proposes to establish a least common denominator standard, under which the CLEC would get the same terms *from the building owner* as the ILEC. As between the two carriers that may be fair – but because of the different risks presented to the building owner by the different classes of carriers, it is not fair to the owner. Furthermore, it makes it impossible to argue that only the ILEC is being regulated: there is no question that the party stuck in the middle, the building owner, is the target of the proposed regulations.

So *Cable & Wireless* is readily distinguishable and only superficially helpful to the Commission. In addition, although we will not take the time to discuss it here, the case is loosely — not to say poorly — reasoned. Given the strong factual differences between the two situations, we are confident that if given the opportunity the court would seek to clarify its logic.

Section 202(a). The FNPRM also points to Section 202(a) to justify regulating "discriminatory" access agreements made by carriers. Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

The purpose of Section 202(a) is merely to prohibit discrimination in the provision of service by *carriers* to their *customers. See, e.g., American Trucking Associations v. FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The first clause prohibits discrimination "in connection with like communications service," meaning that customers getting the same service must be treated the same way. The first clause clearly does not confer authority over building access agreements because carriers do not provide telecommunications services to building owners under such agreements.

The second clause prohibits the giving of any "undue preference" by a carrier. In its historical context, this clause is intended to prevent carriers from favoring particular types of customers over others. It is based on a provision of the Interstate Commerce Act designed to require railroads and other transportation carriers to serve all places and people on comparable terms. *See* Huber, *et al.*, Federal Telecommunications Law, 2d ed. (1999) at §3.11.4. Building owners are not subscribers, and building access agreements are not tariffs or contracts for service. Consequently, Section 202(a) does not apply.[90]

Section 205(a). The FNPRM relies heavily on Section 205(a), asserting that "there is a strong case that the Commission has the requisite authority, under Section 205(a) of the Act, to promulgate a regulation that bars the practice that contributes to this result," citing *Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981). FNPRM at ¶ 135. Not only does the FNPRM misconstrue the purpose of Section 205(a), but it completely misreads the *Western Union* case. Section 205 (a) states:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation or practice of any carrier or carriers is or will be in violation of any of the provisions of the Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation . . . ."

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[90] In addition, under the FNPRM's theory, it is difficult to see how this section would apply to building access agreements. If anything, it is the owner that is presumably giving the carrier the preference. The very reason the Commission is dealing with this question is that ILECs often have access to buildings on favorable terms. One might argue that it is the CLEC that is giving the preference, but that helps neither the CLEC nor the Commission. If the CLEC refuses to serve the building, it is no better off. And if the CLEC, on order of the Commission, refuses to abide by its agreement, it faces the prospect of being found in breach of contract. It would be more appropriate to argue that a carrier that gives one building owner better terms than another has given an undue preference. But again, that does little to help the CLEC.

Contrary to the FNPRM, therefore, Section 205 does not grant any rulemaking authority. It merely establishes a mechanism for the Commission to direct a carrier to modify a tariff. *See, e.g., AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973). The traditional tariffing process – which was not modified by the 1996 Act, except to allow the Commission to forbear from regulation such as by exempting carriers from the tariff requirement when appropriate – requires a carrier to file tariffs describing the rates and other terms and conditions applicable to its common carrier services.

Section 205 must be read in conjunction with Sections 203 and 204. Section 203 requires carriers to file tariffs. Section 204 authorizes the Commission to suspend a new tariff for up to five months, pending a hearing on the lawfulness of the tariff, provided that if the proceeding is not completed within five months the tariff will be deemed effective. Section 205 in turn permits the Commission to review and modify an existing tariff. *See, e.g., AT&T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988) (Starr, J., concurring); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977); *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

Under Section 205(a), the Commission may only review rates and charges contained in tariffs, and carrier practices set forth in tariffs. *See, e.g., MCI v. FCC*, 561 F.2d 365, 375 at n. 44 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978). In addition, the Commission must hold a hearing. *Id.* And finally, Section 205(a) does not grant any particular authority – the Commission can only examine the tariff to see if "it is or will be in violation of any of the provisions of [the] Act." Section 205(a). Before prescribing a rate or a practice contained in a tariff, the Commission must be able to show that the tariff violates some other provision of the Act. *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

The FNPRM, however, seems to assert that Section 205(a) gives the Commission authority to adopt rules that directly regulate any "practice" of a carrier. FNPRM at ¶ 135. For the reasons noted above, this is obviously not the case, but the FNPRM quotes *Western Union*, claiming that the case upheld rulemaking under Section 205(a). Nothing could be further from the truth. In *Western Union*, the petitioners argued that an FCC decision unbundling telex rates violated Section 205(a), because no hearing had been held. Upholding the decision, the D.C. Circuit stated that "the Commission was not engaged in ratemaking, however, but in making policy." 665 F.2d at 1151. In other words, Section 205(a) simply did not apply, because of the nature of the proceeding. That is not the same thing as saying that Section 205(a) authorizes rulemaking, which is what the FNPRM claims at ¶ 135 and footnote 325.

Section 411 and the Ambassador Hotel Case. Section 411 of the Act and *Ambassador, Inc. v. United States,* 325 U.S. 317 (1945) have absolutely nothing to do with the regulation of building owners or the terms on which carriers are permitted to enter or use private property. The *Ambassador* case stands for the unobjectionable principle that the Commission can interpret and enforce the terms of lawful tariffs filed by carriers. In the course of adjudicating such a case, the Commission may be able to assert jurisdiction over a carrier's customer under Section 411(a). That is as far as the case goes. If *Ambassador* has any relevance at all in this proceeding, it is that it actually limits the Commission's ability to regulate building owners indirectly, because it states that the Commission cannot regulate the business affairs of a subscriber or a third party.

The facts in the case were simple: Hotels in the District of Columbia had obtained telephone service under tariff. The hotels had also installed private branch exchange (PBX) equipment and employed their own personnel to operate the PBX and connect guests with the public switched network for local and long distance calls. The hotels charged their guests a surcharge on each outside call, which exceeded the tariffed rate at which the hotels paid for service; the tariffs under which the hotels obtained service prohibited the surcharges. In effect, the hotels were subscribing to service, and then reselling it. The Commission asked the Attorney General to seek an injunction against the hotels. An injunction was issued, and the Supreme Court upheld the district court's decision. As part of its holding, the Supreme Court found that the hotels were proper parties to the enforcement action under Section 411(a).

The FNPRM's reliance on *Ambassador* and Section 411(a) is misplaced for the following reasons:

The Ambassador case did not involve a rulemaking proceeding. The FNPRM does not explicitly assert that *Ambassador* or Section 411(a) could be applied to exercise jurisdiction over building owners in the context of a rulemaking, but we wish to dispel any such suggestion. Because *Ambassador* involved an adjudication in district court, the case cannot be said to stand for the proposition that Section 411(a) gives the Commission general jurisdiction or authority to adopt rules affecting hotels or building owners. Nearly all of the cases that cite *Ambassador* involve the interpretation or enforcement of tariffs or other types of adjudications. This is because Section 411(a) was intended to apply only in adjudications: the title of the section is "Joinder of Parties" and the term "joinder" typically arises in the context of litigation rather than rulemaking. Furthermore, Section 411(a) itself states that it applies to proceedings "for the enforcement of the provisions" of the Communications Act, and contains no reference to rulemakings.[91] If Section 411(a) were read any other way, it would subsume the limitations on

[91] The Commission sometimes has found it necessary to join affiliated entities, successors or predecessors in interest, and sometimes officers, directors and shareholders of regulated entities. *See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co.*, Docket No.

the Commission's jurisdiction in Section 2 of the Act and allow the Commission to initiate rulemakings beyond the bounds set in Section 2.

The Ambassador case does not permit the Commission to regulate the terms of building access. The defendant hotels in *Ambassador* were termed subscribers of the carrier by the Supreme Court, and they had contracts with the carrier in the form of the tariffs under which they obtained telephone service. They then resold service to their guests. It was the hotels' subscriber relationship that was being regulated, and that is a critical difference between the subject of this proceeding and the *Ambassador* case. Building owners may subscribe to receive telecommunications services, and if disputes arise regarding the terms on which service is to be provided, the Commission may have jurisdiction to join building owners because they are subscribers. But as we have noted several times, the terms on which a building owner subscribes to service have nothing to do with any rights a carrier may have to install facilities in a building:

17441, *Memorandum Opinion and Order and Certificate*, 18 F.C.C. 2d 783 at ¶ 13 (969) (AT&T joined as parent of New York Telephone); *Armstrong Utilities v. General Telephone Company of Pennsylvania*, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 F.C.C. 2d 385 at ¶ 8 (1970) (joinder of parent and affiliate); *Warrensburg Cable, Inc. v. United Telephone Co. of Missouri*, Docket Nos. 191951, 19152 P-C-7655 P-C- 7656, *Memorandum Opinion and Order*, 27 F.C.C. 2d 727 at ¶ 22 (1971) (joinder of successor in interest); *Continental Cablevision of New Hampshire, Inc.*, Docket No. 20029, *Memorandum Opinion and Order*, 48 F.C.C. 2d at ¶ 6 (1974) (joinder of parent corporation); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, File No. E-84-1, *Memorandum Opinion and Order*, 103 F.C.C. 2d 600 at ¶ 15 (1985) (predecessor in interest and sole officer, director and shareholder). None of these cases deals with building owners, with real property, or indeed with any party not intimately engaged in an activity clearly subject to Commission regulation. Once again, the essence of the matter before the Commission has to do with the use of real property, not communications. Building owners are not typically affiliated with carriers or involved in managing their activities. If they are, they might become subject to joinder under Section 411(a) in that capacity. But merely allowing a carrier to occupy real estate is not sufficient to justify joinder. Otherwise, the Commission would be able to assert control over any person that has a contractual relationship of any kind with a carrier. For that reason, if the Commission were to attempt to join a building owner under its Section 208 complaint process, any Commission decision would be extremely vulnerable on appeal.

building access agreements are not agreements for the provision of telecommunications services, but rather agreements for the right to use property. Unlike the hotels in *Ambassador*, building owners do not pay LECs for service (in their capacity as building owners) and they do not ordinarily resell service to their tenants.

With the states, the Commission has the authority, jurisdiction, and expertise to regulate the terms on which telecommunications services are provided, but it has neither authority, jurisdiction nor expertise with respect to real estate matters. That a piece of real estate may be used in connection with the provision of telecommunications services is irrelevant: the Commission can no more regulate the terms of building access than it can regulate the rents carriers pay for administrative office space.

The Commission cannot regulate the real estate operations of building owners indirectly by regulating carriers. In *Ambassador,* the Supreme Court stated that a carrier "may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility services, the regulation will necessarily affect, to that extent, its third party relationships." 325 U.S. at 323-324. In other words, the only rights a carrier has against a building owner that can be enforced under Section 411(a) are those related to the provision of the carrier's service. It bears repeating that when a building owner grants a telecommunications provider access to a building, the purpose of the agreement is not to extend service to the owner, but to the owner's tenants. Service is not provided to the building or the building owner, but to subscribers occupying the building. The owner is not the subscriber or the recipient of telecommunications services. If anything, the owner is providing a service to the carrier, in the form of the construction and management of the building, which creates a market for the carrier. Therefore, the Commission cannot impose requirements on carriers that are intended to induce building owners to grant nondiscriminatory access to buildings, because building access is unrelated to the terms of any service to which the building owner may actually subscribe. The Commission may be able to regulate a building owner that is itself reselling services (as in *Ambassador*), acting as an aggregator, or providing Shared Tenant Services. But allowing a carrier to occupy space in a building is not the same as any of those things.

C. The FCC Does Not Have the Authority to Order a Carrier Not To Serve a Customer.

The FNPRM appears to propose to enforce a nondiscrimination requirement by directing carriers not to deal with building owners who "discriminate." FNPRM at ¶ 143. While we understand that various proponents of forced access regulation have suggested this approach and that it did not originate with the Commission, to call the proposal extreme would be the height of civility. The prospect of cutting off service to wholly innocent subscribers in the name of enhancing competition is bizarre. "[C]ustomers, not equipment manufacturers are the special responsibility of the FCC." *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1122 (3d Cir. 1979). Surely the interests of customers are paramount to those of carriers as well.

Even if the Commission possessed the power to regulate building owners indirectly through the agency of telecommunications carriers, the legal pitfalls remain daunting because the proposed sanction is itself unlawful. If a carrier cuts off service to a building whose owner it believes to be discriminating unreasonably, the literal terms of Section 214(a) would require the Commission to certify that "neither the present nor future public convenience and necessity will be adversely affected thereby." Paramount to the public convenience in such a case would the interests of the tenant subscribers.

Without more, this would not be merely an action "considered to arise from the tariff" and seen "as a sanction directed at the particular customer, rather than as a diminution in the service provided to the community." *Pacific Telatronics, Inc.*, 74 F.C.C. 2d 286, 290 (1979). The residential or commercial subscribers in the building, taken together, plainly constitute a "community or part of a community" within the meaning of the statute. However intended, discipline aimed at the owner would harm the tenants unfairly.

Surely the Commission would not expect to be able to fashion, through rulemaking, the terms of some "blanket" Section 214 termination-of-service authority. It is one thing to grant blanket construction authority *ab initio*, as the Commission has done, 47 C.F.R. § 63.01, but quite another to give carriers the unbounded discretion to discontinue or impair service.[92]

To the extent a carrier becomes an agent for the Commission, in cutting off service or in defining the terms of service in relation to non-customer, third-party building owners, the more the regulation of the carrier looks like regulation of the owner. And the more suspect the regulation becomes, under the statute or the Constitution.

D. The FCC Cannot Avoid the Takings Clause By Ostensibly Regulating Carriers.

In response to the original NPRM, the Real Access Alliance submitted an analysis of the potential violations of the Fifth Amendment posed by the proposals for regulation of building access then under review. That analysis, prepared by the law firm of Cooper, Carvin &

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[92] Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 16 C.R. 529, 538 (1999).

Rosenthal, concluded that forced physical access to buildings would constitute a taking under Loretto.

In response to the Fifth Amendment issues raised by the FNPRM, Cooper, Carvin & Rosenthal has again examined the proposals being considered by the Commission. This analysis (the "Cooper Carvin Analysis"), which is attached as Exhibit H, concludes that regulating building access through regulation of LECs is no more constitutional than direct regulation of building owners. The Commission cannot circumvent *Loretto* by directing carriers to deny service to building owners, because "[t]he Constitution measures a taking of property not by what [the government] ... says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis added).

Just because the proposed rule would not operate against building owners does not mean it would not have the effect of taking their property. As the Cooper, Carvin analysis notes, the proposed rule is not distinguishable from a situation in which the Commission might seek to acquire the permanent use of one floor of a building for its offices by prohibiting all telecommunications providers from providing service to the building until the owner acquiesced.[93] This would obviously be a taking because it would force the owner to choose between permitting the physical occupation of the property, and the destruction of the economic value of the building. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) ("when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking") (emphasis added); *Nollan v. California Coastal Comm'n*, 483 U.S. 825

[93] Cooper Carvin Analysis at 9-10.

(1987) (invalidating attempt to condition building permit for ocean-front residence on grant of permanent public easement across beach).

In the face of these cases, the FNPRM's reliance on by *Yee v. City of Escondido*, 503 U.S. 519 (1992), is entirely misplaced. There was no threat in *Yee* of rendering the mobile home parks "economically idle," nor was the City of Escondido using its regulatory power over one class of entity to extort concessions from property owners. Furthermore, the combined effect of the state and local laws did not constitute "indirect" regulation. *Yee* simply has no bearing on this case at all.[94]

E. Even if the FCC Had the Authority to Regulate Access Agreements Made by Carriers, Effective Regulation Would Be Impossible.

Not only is the "nuclear sanction" of cutting off service to all the tenants in a building unlawful, but it is entirely impractical. Past experience shows that the Commission does not have the resources to handle large numbers of proceedings involving complex issues in a timely manner. The issues posed by the proposed regulation of carriers - particularly the proposed sanction of cutting off services to building tenants - are complicated and time-consuming to adjudicate. The Commission cannot handle potentially thousands of disputes on the terms of access to buildings.

To ask a carrier to detect and judge the existence of unreasonable discrimination is far more complex than the examples recited in the FNPRM. By establishing "benchmark" international settlement rates, the Commission made it relatively easy for U.S. carriers to desist from agreements breaching those benchmarks. FNPRM at ¶137. In the *Ambassador* case, it was relatively easy for the telephone company to insert a clause into its tariff forbidding such

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[94] Copper Carvin Analysis at 11-13.

surcharges. Imagine, however, a carrier trying to write a tariff provision against unreasonable discrimination in building access. FNPRM at ¶¶140-43.[95] How would such a tariff apply to a building owner, who would not be a customer of the carrier?

The trouble is that the FNPRM is concerned with alleged discrimination by building owners – but even if a contract between a building owner and a LEC could be considered discriminatory, it would be the building owner and not the LEC that was discriminating. Furthermore, the owner would be discriminating in favor of the person providing service in the building. It is difficult to see what incentive the carrier would have to refuse to deal with the owner. First, the carrier would have to become aware of the facts alleged to constitute discrimination; second, the carrier would have to become aware that those facts actually constituted discrimination; and third, the carrier would have to refuse to deal, presumably by cutting off service. This is nothing short of madness.

For example, if an ILEC were the only company providing service in a building, how would the ILEC know if the reason it had no competition was because the owner was excluding other providers, or because no other carrier was interested in providing service? Even if the ILEC had reason to suspect "discrimination," how could it cut off service to the building or take any other step that would harm either the owner or the tenants without a determination on the facts and on the legality of its actions? What role would the state commissions have?

Or consider the example of an ILEC providing service without paying an access fee, while a CLEC is required to pay for access. First, the ILEC must become aware that the CLEC

[95] In the *Ambassador* case, of course, the telephone company itself proposed the corrective action on surcharges, later ratified by the Commission and the court (on different grounds). Here, the Commission effectively would be "prescribing" a practice and would be required to adhere to the requirements of Section 205 of the Communications Act, including a "full opportunity for hearing."

is paying a fee. If we assume that this occurs, and that the fee requirement alone constitutes discrimination, what is the ILEC to do? Voluntarily exit the building and leave the market to the CLEC? This would never happen.

So self-policing cannot work – the Commission would have to make these determinations. Presumably, the Commission could allow the CLEC to bring a complaint against the ILEC, review the facts and determine whether there was "discrimination." There are too many problems with this approach to list them all. First, it seems strange to us that this could be done without involving the building owner, who might have something to say about the reasons for differences in the terms of access and who has the right to due process. But the Commission has no power over the building owner and cannot compel the building owner to cooperate. Second, how does it advance the Commission's goals to direct one or both carriers to cut off service to the building? Third, if the Commission orders one carrier not to comply with the terms of its agreement – presumably the CLEC, perhaps by not paying the access fee – what is to prevent the building owner from seeking to enforce the contract in court, or resorting to some contractual remedy, such as removing the CLEC's equipment? Fourth, what if the ILEC has no written agreement, but claims the right to remain on the property under state law, whether by right of condemnation, under a prescriptive easement, or some other mechanism? Does that mean the CLEC gets exactly the same rights?

Finally, the Commission's track record is not encouraging. The closest example to the proposed regulation of building access in recent years has been the adjudication of cable rate regulation disputes. Cable regulation disputes are similar to the type of fact-specific inquiries the Commission would have to undertake to enforce the "nondiscriminating" access proposals. To determine whether building access is being granted on a non-discriminatory basis, the

Commission would have to examine evidence on a case-by-case basis. Such evidence may include individual contract terms and comparison of comparable contracts with similar buildings. In many cases, there are no written agreements outlining terms with existing providers.

The Cable Services Bureau was specifically empowered to resolve cable rate regulation complaints, and this mission was reflected in its staffing, but the process has proven glacially slow. In 2000, for example, the Cable Services Bureau resolved 36 cable rate regulation disputes. The average age of a cable rate case resolved in 2000 was <u>over 63 months</u>.[96] If it takes the Commission <u>more than five years</u> to resolve cable rates disputes — a matter clearly within the Commission's jurisdiction and expertise, how will it handle building access complaints in anything like a reasonable time? Especially when neither the Wireless Bureau nor the Common Carrier Bureau has been assigned additional staff to resolve mandatory access complaints.

And how would such a process speed up building access negotiations? The only way the Commission could improve on the pace of free market processes would be if it made summary decisions in favor of providers - and thereby violate the rights of property owners. Not only is such a prospect immensely troubling in itself, but it would completely contravene the intent of the 1996 Act. The Alliance has voluntarily adopted Best Practices Guidelines, which will help tenants obtain access to competitive service providers in a timely fashion. The Commission must reject attempts to contravene market solutions by imposing the type of stifling regulation that the 1996 Act was designed to eliminate.

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[96] *See* Exhibit I for a list of cable rate decisions issued in 2000. Seven orders did not specify the date of the original complaint. This average is based on the 29 complaints where starting date information was available.

We could go on, but the fact is that the complexities and ramifications of applying the proposed sanction are so many, and so apparent on even a cursory examination, that it is clear that this is not a path Commission will want to pursue for long.

III. A REQUIREMENT THAT CARRIERS PAY BUILDING OWNERS JUST COMPENSATION DOES NOT SATISFY THE FIFTH AMENDMENT.

The Cooper Carvin Analysis also demonstrates that the Commission cannot avoid the Takings Clause by simply directing carriers to pay building owners for access.[97] The Commission has no authority – express or implied — to take the property of building owners in the first place, so the compensation issue never even arises. We discussed this issue at length in our earlier comments, as well as in the constitutional analysis attached to those comments.

In addition, in *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the court invalidated the Commission's collocation rules even though the Commission had allowed ILECs to recover the costs of permitting collocation through tariffs. In other words, the FCC has already tried the approach proposed in the FNPRM to circumvent the Constitution, and lost. It is not enough for the Commission to simply require carriers to pay, because there may be residual liability if the amount provided for is inadequate.[98]

A related flaw is that the FNPRM does not provide a formula for determining compensation. The Commission would have to develop such a formula because otherwise there would be no assurance that the rate payable under a particular agreement would meet the constitutional test for "just compensation."[99]

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[97] Cooper Carvin Analysis at 14-22.

[98] Cooper Carvin Analysis at 17.

[99] *Id.* at 20-22.

Finally, the existence of the Tucker Act does not permit the Commission to ignore its constitutional obligation. If the FCC's compensation scheme proved inadequate, the government would still be liable, which is exactly why the FCC cannot effect a taking without authority. Otherwise, government agencies would be free to take property at will, leaving it to the courts to determine compensation, and to Congress to find the money after the fact. That is why the FNPRM's scheme violates the Fifth Amendment.[100]

IV. THE COMMISSION MUST NOT ATTEMPT TO FURTHER EXPAND THE MEANING OF THE TERM "RIGHT-OF-WAY."

A. The FCC's Interpretation of Section 224 is Already Erroneous and the FCC Should Not Compound the Error.

As we discussed in our original comments, and will address in our Petition for Reconsideration, the Commission has already misinterpreted the language and purpose of Section 224 in two ways. First, Section 224 was never intended to apply to facilities inside buildings; and second, there is no such thing as a "right-of-way" inside a building. The FNPRM now proposes to compound the error by interpreting a "right-of-way" as granting a right to install facilities anywhere in a building, regardless of where existing facilities happen to be located. FNPRM at ¶ 170.

The term "right-of-way" has two related meanings: it refers either to the right to pass over land without interference, or to the associated strip of land used for that purpose.[101] There are no rights-of-way inside buildings, under either definition. The term does not apply to any right to enter a building, because the right to enter a building is always subject to interference: a

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[100] *Id.* at 19-20.

building owner may close and lock the building; may limit after-hours entry to its employees or tenants; may limit entry by service personnel to certain hours or conditions, such as by requiring that they be escorted; and so on. Because there is no right of unimpeded access inside a building, there is no right of passage that conforms to the definition of a "right-of-way." Furthermore, there can be no physical strip of property associated with a right of passage that does not exist.

In this regard, we note that we have identified no case, treatise, or other source that refers to "rights-of-way" inside buildings, nor does the FNPRM cite any such authority.

In any case, even if rights-of-way did exist inside buildings, rights of-way would not be unbounded rights of access. The FNPRM is properly concerned about that question and the Commission should heed its own words at footnote 206, where it stated that "a broadly worded easement" would not, in itself, create a right-of-way. The holder of a right-of-way may only use the right to pass from one point to another.[102] The cases routinely refer to rights-of-way in the secondary sense of associated land as "strips" of land. Common sense dictates that this is true. Railroads have the right to cross property only in a linear fashion. The right to install track does not include the right to install a station or depot. The same is true in the utility context. An easement to cross farmland with electrical transmission lines does not carry with it the right to go anywhere on the property. And the right under Section 224 to use poles located in an easement does not permit a telecommunications provider to install its facilities in the servient estate outside the easement.

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[101] *See* Reilly, The Language of Real Estate (2d ed. 1982) at 418; *Kalinowski v. Jacobowski*, 100 P. 852 (Wash. 1909) ("right-of-way" is the right "to travel over a particular tract of land without interference"); 65 Am. Jur. 2d, Railroads § 50.

[102] "A grant or reservation of a right to pass on a private way to one lot does not confer the right to pass further on the same way to another lot. Similarly, a right of way appurtenant to a

Furthermore, the purpose of Section 224 is to allow telecommunications providers and cable companies to take advantage of the existing facilities of *utilities*. The proposed interpretation would allow them to take advantage of the facilities of *building owners*. This violates not only the statute, but the Fifth Amendment.

The Commission therefore cannot expand the rights of existing telecommunications providers to allow competitors to go anywhere in a building. Neither Section 224 nor the concept of a right-of-way permit it.

Similarly, there are no circumstances in which a utility may "own or control" a right-of-way in the absence of a defined space. The concept of a right-of-way *demands* a defined space. For one thing, any other interpretation could result in a claim that a utility "controlled" the entire interior space of a building. This is simply illogical, and indicative of the morass into which the Commission would get itself into by trying to address this topic.

B. Any Expansion of the Term "Right-of-Way" Would Raise the Prospect of a Taking.

The FNPRM's proposal would unquestionably result in a taking. The Commission cannot grant a telecommunications provider any property right in a building that the building owner has not already granted to an incumbent utility. If the building owner has not transferred a property right to a utility, then the owner has retained that right and the Commission cannot effect a transfer of that right to a telecommunications provider without taking the building owner's property. *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), *reh'g, en banc, denied,* 226 F.3d 1220 (11th Cir. 2000). This is especially true because exercising such a

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particular lot cannot be used as a mode of access to another lot to which it is not appurtenant." 25 Am. Jur. 2d, Easements & Licenses, § 86 (1996).

right would involve the permanent physical occupation of the property, as was the case in *Loretto*.

This illustrates the fundamental practical problem with the Commission's attempt to extend Section 224 inside buildings. Such rights as utilities typically have are very narrow. They have to be, because they are not intended to allow utilities unlimited access to any part of the building. They are intended only to allow the utility to occupy those portions of the building that it must occupy to deliver its service, and no more. Even if a particular grant gives the utility fairly wide discretion, that grant carries with it the presumption that the discretion will be used reasonably and only for the specified purposes. The right to install facilities in a building does not carry with it the right to go anywhere or run multiple sets of wires helter-skelter.

C. An Expansive Definition of "Right-of-Way" Would Eviscerate the Cable Inside Wiring Rules.

The fundamental purpose of the cable inside wiring rules is to limit the ability of incumbent cable operators to use their incumbency and market power to force MDU owners to sign unfavorable agreements. The rules strike a delicate balance between promoting competition in the delivery of video services in MDUs and protecting the rights of incumbent providers under the Constitution and state law. Consequently, the rules do not apply if a provider has "a legally enforceable right to remain" in a building. 47 C.F.R. § 76.804.

Any federal rule that would allow a video programming provider to install its facilities anywhere in a building over the objections of the building owner would circumvent the inside wiring rule. In fact, the Commission may already have done so in at least some cases; expanding the definition of "right-of-way" to allow a provider access throughout a building would merely make things worse. By interpreting Section 224 to extend inside buildings, the Commission appears to have given every cable operator a "legally enforceable right to remain" in any building in which it already has facilities, if those facilities are located within the defined space occupied by an incumbent utility. If a building owner seeks to exercise its rights under §76.804, the provider can simply counter by asserting that Section 224 now gives it a right to remain on the premises.

In actuality, we believe that such rights would only exist in a small minority of cases. Unless a property owner has conveyed an easement to a utility that is defined in a way that permits access to the building from the public right-of-way, and permits entities other than the utility to use the easement, we believe that a property owner retains the right to bar a telecommunications provider from entering the building without first agreeing to the terms of an access agreement. We also believe that, unless expressly forbidden by the terms of an easement or access agreement, owners can direct utilities to remove or relocate their facilities. On the other hand, if a utility's access rights take the form of a license, which is the most common form of access right, a utility will not own or control anything inside a building. Consequently, in most cases, we do not believe that telecommunications providers or cable operators will be able to rely on the Commission's new interpretation. Nevertheless, in those cases in which an easement clearly permits access to the property from the outside and permits third parties to occupy the easement, it appears that the cable inside wiring rules will not apply.

V. THE FCC SHOULD CONTINUE TO EXEMPT RESIDENTIAL BUILDINGS FROM ITS PROHIBITION ON EXCLUSIVE CONTRACTS.

As the Commission is well aware, the most intractable problem presented by the telecommunications market is the delivery of competitive local exchange service at the residential level. The high cost of network construction combined with the presence of an entrenched competitor makes facilities-based competition extremely difficult to achieve. Developing competition at the residential level is particularly difficult because of the high unit cost of delivering the service: on average, residential subscriber density is lower than that of business subscribers, and the revenue per residential customer is far lower. This is a fairly simple analysis to perform, and we presume the Commission has more than enough data to confirm it.

As noted in the FNPRM, at ¶¶ 32-33, we have provided the Commission with an analysis of the revenue potential of residential buildings compared to office buildings, which we reproduce here:

Annual revenue from providing video service in an average-sized apartment building:

- 30 units x $50 per month per unit ($600 per year) = **$18,000**

Annual revenue from providing video service in a median-sized apartment building:

- 150 units x $50 per month per unit ($600 per year) = **$90,000**

Annual revenue from providing telecommunications service in an average-sized office building:

- 20 tenants x $1000 per month per tenant ($12,000 per year) = **$240,000**

Annual revenue from providing telecommunications service in a median-sized office building:

- 30 tenants x $1000 per month per tenant ($12,000 per year) = **$360,000**

Therefore, an average-sized office building can yield over 13 times as much revenue as an average-sized apartment building. When comparing a median-sized office building to a median-sized apartment building, the office building yields four times as much revenue.[103] The

[103] The above analysis is based on the following assumptions:

- According to the BOMA *Critical Connections* survey, the average number of tenants in office buildings is 22. We have used 20 to simplify the arithmetic and provide a slightly more conservative figure. The median number of tenants in the buildings covered by the BOMA survey was between 20 and 40, so we have assumed that the median number of tenants in a building is 30.
- The number of units in apartment buildings varies greatly, but according to Census Bureau data available on the National Multi Housing Council's Web site, there are about 15,029,100 apartment units in 518,820 apartment buildings with five or more rental units. This is an average of 29 units per building. In the first example, we have rounded to 30 units both to simplify the arithmetic and to provide a slightly more conservative figure. The second example, using 150 units, represents the roughly 46% of apartment buildings that have between 50 and 300 units. On that basis, we have assumed that the median number of units in an apartment building is 150.
- According to the FCC's 1999 Annual Cable Television Competition Report, average cable revenue per subscriber is $44. We have rounded this figure to $50 for the same reasons as above.
- We do not have an accurate figure for the average amount paid by office building tenants for telecommunications services. For purposes of this comparison, we have used $1000 per month, which we believe is a conservative estimate. The estimate was calculated by dividing an estimate of total revenues received by telecommunications providers from business subscribers by an estimate of the number of office tenants in the country. The $1000 figure is only an approximation, but we think it provides a rough basis for comparison. We presume that the Commission could obtain such information from carriers.

  According to the Census Bureau's 1992 Economic Census, there are 5,829,983 business establishments in the country. Note that this figure is likely to be considerably higher than the number of office tenants because many businesses, especially smaller ones, will not rent space in office buildings. Therefore, to estimate the number of actual office tenants, we subtracted the number of business establishments that had no employees (411,549) or only 1 to 4 employees (2,330,762), which resulted in 3,087,671. We rounded that number to 3.1 million.

  To determine total telecommunications revenues received from office tenants, we started with the Census Bureau's estimate of local, long distance and network access revenue for 1998. The Census Bureau reports $30.3 billion in nonresidential local service revenues, $60.0 billion in long-distance revenues, and $31.7 billion in network access revenues, for a total of $122 billion. We ignored long distance revenues, and assumed that all network access revenues were ultimately paid by telephone subscribers and received by local exchange carriers, so that nonresidential subscribers paid LECs approximately $62 billion for telecommunications services in 1998. We then reduced that figure by 30% to account for revenue from owner-

FNPRM notes that we applied the same reasoning to telecommunications without providing additional data. While this is correct, the initial analysis still proves the point with respect to telecommunications competition, because the numbers do not change much. The fact is that the average residential telephone subscriber does not pay much more per month for local telephone service than he does for cable television. Even if one doubles the $50 per month figure used above, the revenue in an average-sized building is only $36,000 per year, and the revenue for a median-sized building is $180,000. This narrows the gap somewhat, but it is still substantial. Furthermore, we believe our assumptions regarding business revenues were quite conservative, so the gap is very likely wider than in our example. It should be relatively simple for the Commission to obtain the necessary figures from carriers.[104]

Accordingly, we think it is fairly simple to establish that the market for residential telecommunications services, even in MDUs, is substantially different than that for business services. The Commission should not regulate exclusive contracts for telecommunications service in residential buildings for the same reasons it has not regulated exclusive contracts for cable service: the only way to encourage competition in the residential market is by allowing small providers to develop a toehold.[105] If they are permitted to serve MDUs on an exclusive

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occupants and other subscribers who do not rent space in office buildings. The resulting figure of $43 billion was then divided by 3.1 million office tenants for an average of $13,870 per year or $1156 per month, which we rounded down to $1000 to provide a conservative figure. If long distance revenues are included, using the same method yields an average of $2400 per month.

- Note that we have assumed 100% penetration rates for both types of service, which exaggerates total cable service revenues by about one-third, based on historical experience.

[104] The CLEC Report states that businesses spend about $1,500 per month on broadband services, while residences spend $50. CLEC Report ch. 3 at 19. This supports our analysis.

[105] *See also* Lansdale Declaration at ¶ 13; Ansel Declaration at ¶¶ 5, 6.

basis, they can be assured of sufficient cash flow to justify an initial investment. Over time, they may be able to expand outside the MDU market. Banning exclusive contracts, however, will expose small competitors to the certain threat of intrusions and anti-competitive actions by the incumbents.[106]

Finally, as discussed above, we do not believe that the Commission has the power to regulate agreements for building access because they are not agreements for the provision of telecommunications service. The Alliance supported and continues to support the Commission's ban on exclusive contracts in commercial buildings because such contracts do not serve the needs of commercial tenants and are rare. Nevertheless, the Commission's authority to adopt the ban is by no means clear. For this reason alone, the Commission should refuse to extend the ban to residential buildings.

VI. THE FCC SHOULD NOT INTERFERE WITH EXISTING EXCLUSIVE CONTRACTS IN COMMERCIAL BUILDINGS.

Once again, the Commission's authority to ban prospective exclusive contracts is questionable. It therefore follows that the Commission's authority to abrogate existing contracts is at least as questionable. Furthermore, there is no evidence that exclusive contracts present a significant barrier to competition in commercial buildings. The FNPRM cites no statistics or other quantitative evidence regarding the number or prevalence of exclusive contracts in

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[106] Of course, incumbents can negotiate exclusive contracts as well. As far as we are aware, however, it is relatively rare for an ILEC to enter into any kind of agreement with an MDU owner, much less an exclusive one. Furthermore, a new entrant is unlikely to choose to enter a building that is already served by an incumbent, except in unusual circumstances, so the option is of much more benefit to the competitor than it is to the incumbent. The challenge for residential CLECs will be to show that they offer better service, lower prices, or additional features that differentiate them from the incumbent, and a sheltered environment is the best place for them to start.

commercial buildings. Indeed, the FNPRM does not even refer to any anecdotes referring to such contracts. We believe that the record in this stage of the proceeding will be equally thin.

In addition, as existing contracts expire, they will necessarily be replaced by nonexclusive contracts under the Commission's ban. We believe that there are few long-term exclusive contracts in force. Consequently, the Commission has no reasonable basis for abrogating existing contracts.

VII. THE COMMISSION CANNOT AND SHOULD NOT REGULATE PREFERENTIAL MARKETING AGREEMENTS AND SIMILAR ARRANGEMENTS.

Marketing agreements are exactly what they are called: Agreements under which building owners provide telecommunications carriers with marketing services. The Commission's authority to regulate such arrangements is as tenuous as its authority over exclusive contracts.

In any case, the Commission's goals are actually better advanced by not regulating such arrangements.

In a typical marketing agreement, a building owner agrees to provide one or more special services to the provider. These may range from merely handing new tenants applications for service or advertising fliers, to actively soliciting tenants, demonstrating the capabilities of a provider's service, distributing literature throughout the property, providing advertising space in a building newsletter, holding events in the building lobby, and many other activities that serve to enhance the reputation and market share of the provider.[107] The benefit to the provider, particularly the unknown competitor, is obvious: the building staff essentially serves as an

[107] Bitz Declaration at ¶ 13. Ansel Declaration at ¶ 7-8; Lansdale Declaration at ¶ 15.

extension of the provider's marketing staff. One benefit to the building owner is a marketing fee, which may be rolled into the fee for building access. Another benefit is a closer relationship with the provider, in case there are service problems. But there is risk for the owner as well: the more aggressively the owner markets the provider's service, the more closely the provider and the owner will be linked. If the provider proves unreliable, this will immediately harm the owner's relations with its tenants. The owner will be expected to correct the problem, and will face the consequences of tenant dissatisfaction if it does not.[108]

Such agreements also benefit tenants. Because the owner has a greater stake in the provider's reputation, the owner is more likely to consider the provider's reliability and service quality before entering into the agreement, and more likely to monitor the provider's performance.

VIII. THE FCC SHOULD WELCOME BLECs AS ANOTHER MECHANISM FOR DELIVERING SERVICES AND PROMOTING COMPETITION.

The FNPRM asks for comment on several issues related to "building LECs" or "BLECs." Although some prominent real estate firms have invested in such companies, the Alliance was formed to preserve the ability of building owners to control access to their property. In addition, we believe that the BLEC industry is in a better position to answer the Commission's questions regarding the types of services they provide and the nature of their relationships with building owners.

Having said that, however, we also believe that the Commission should welcome the participation of the BLECs in the telecommunications marketplace. Property owners invested in BLECs in the first place because they had concluded that the more traditional CLECs were not

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[108] Ansel Declaration at ¶ 10.

responsive enough to the needs of building owners and their tenants. Rather than emphasizing the construction of facilities in the public rights-of-way, BLECs concentrate on installing networks within buildings, and providing a range of advanced services, including non-telecommunications services, to tenants.[109] This represents a very different business model from that of the CLEC industry. Given recently expressed concerns over the financial health of the CLEC industry,[110] the BLEC approach may well prove to complement the CLEC strategy in ways that advance the Commission's overall policy goals even more than the traditional CLECs. We also note that only a handful of property owners have invested in BLECs, and that BLECs have agreements to serve only a relatively small number of buildings. Accordingly, we urge the Commission to refrain from imposing special regulations on the BLECs.

That is not to say, however, that the BLEC's should not be subject to all the regulations applicable to them by virtue of their status as carriers. Unlike property owners, BLECs themselves would appear to be subject to the Commission's jurisdiction, at least with respect to their provision of telecommunications services. Consequently, we presume that the BLECs have the benefit and burden of all Commission regulations that apply to other CLECs.

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[109] New Paradigm Resources Group, The BLEC Report (1st ed. 2001) at 1-2, 1-3.

[110] *See, e.g., Telecommunications Reports* at 9, 23 (Dec. 18, 2000).

CONCLUSION

We respect the Commission's continuing commitment to promoting local competition in every sector of the market. We hope that the Commission will respect the real estate industry's commitment to serving its customers. Allowing the Alliance's guidelines and model documents the opportunity to set a standard and permitting the free market to continue to work will achieve far more than regulation could. Although we maintain as strongly as ever that the Commission has no power to interfere in relations between building owners and telecommunications providers, the Alliance will continue to work with the Commission and the telecommunications industry to develop mutually agreeable approaches to the issues that concern the Commission. The Commission, however, must respect the limits of its jurisdiction and the Constitution.

Respectfully submitted,

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List of Exhibits

Exhibit A	Members of the Real Access Alliance
Exhibit B	Declaration of Brent W. Bitz
Exhibit C	Declaration of Robert E. Burke
Exhibit D	Declaration of Scott Skokan
Exhibit E	Declaration of Lyn Lansdale
Exhibit F	Declaration of Susan Ansel
Exhibit G	Model License Agreement
Exhibit H	Cooper, Carvin Constitutional Analysis
Exhibit I	Cable Services Bureau: Average Time Taken to Resolve Cable Regulation Proceedings in 2000
Exhibit J	*CUB to Challenge Long Distance Rules*, Chicago Tribune, May 27, 1986, at C5
Exhibit K	Jonathan Weber, *Long-Distance Client 'Theft' Common*, Los Angeles Times, Aug. 20, 1989, at D5